Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Great Lakes Stevedoring,

applicant,

and

International Longshoremen's Association, Local 1879,

certified bargaining agent,

and

Maritime Employers Association,

employer.

Board File: 29834-C
Neutral Citation: 2013 CIRB **681**
May 13, 2013

Counsel of Record

Messrs. Alphonse Lacasse and André Asselin, for Great Lakes Stevedoring;

Mr. Ronald A. Pink, Q.C., for the International Longshoremen's Association, Local 1879;

Mr. John Mastoras, for the Maritime Employers Association.

The Canada Industrial Relations Board (the Board) composed of Ms. Elizabeth MacPherson, Chairperson and Messrs. John Bowman and André Lecavalier, Members, has considered this application by Great Lakes Stevedoring (GLS) for clarification of a certification order. Having reviewed the written submissions of the parties, the Board is satisfied that the written record before it is sufficient and has exercised its discretion under section 16.1 of the

Canada Labour Code (*Part I - Industrial Relations*) (the *Code*) to decide the matter without holding an oral hearing.

I. Background

[1] By virtue of a certification order issued by the Canada Labour Relations Board (CLRB) in March 1991, the International Longshoremen's Association, Local 1879 (ILA 1879 or the union) is the exclusive bargaining agent for a bargaining unit of longshore checkers employed by employers in the Port of Hamilton, Ontario (Board order no. 5894-U, amended by order no. 6274-U issued July 28, 1993). With the exception of longshoremen employed by Federal Marine Terminals (FMT; formerly Seaway Terminals), who were and continue to be represented by other bargaining agents, longshoremen in the Port of Hamilton are represented by another local of the International Longshoremen's Association, Local 1654 (ILA 1654).

[2] The certification orders held by ILA 1879 and ILA 1654 were issued under section 34 of the *Code*, which relates specifically to the longshoring industry. This provision permits the Board to grant bargaining rights in respect of the employees of multiple longshore employers within a particular geographic area. When the Board issues a geographic certification under this provision, it must also require the employers subject to the order to appoint a representative for the purposes of the *Code*. The Maritime Employers Association (MEA) has been the designated employer representative for the longshore employers in the Port of Hamilton since 1993.

[3] By virtue of section 34(5) of the *Code*, the MEA is required to act on behalf of all of the employers that are subject to the union's geographic certification, whether or not they are MEA members:

> 34.(5) An employer representative shall be deemed to be an employer for the purposes of this Part and, by virtue of having been appointed under this section, has the power to, and **shall, discharge all the duties and responsibilities of an employer under this Part on behalf of all the employers of the employees in the bargaining unit**, including the power to enter into a collective agreement on behalf of those employers.
>
> (emphasis added)

[4] The MEA has entered into collective agreements with both ILA 1879 and ILA 1654 that are binding on all longshore employers in the Port of Hamilton.

[5] GLS, the applicant in this matter, is a longshore employer that has operated in the Port of Hamilton since April 1999. Although GLS is not a member of the MEA, it is bound by the collective agreements between the MEA and ILA 1879 and between the MEA and ILA 1654.

[6] A dispute has arisen between ILA 1879 and GLS as to whether ILA 1879's geographic certification order extends to the checking of bulk cargo in the Port of Hamilton. GLS began handling bulk cargo such as grain, coke, iron ore and salt in 2010. In January 2011, ILA 1879 filed a grievance alleging that GLS failed to hire a longshore terminal foreman, as required by the collective agreement, when loading salt onto trucks. This grievance has been submitted to arbitration and hearings are scheduled to resume in late May 2013.

[7] GLS filed the instant application with the Board pursuant to sections 18 and 18.1 of the *Code* on February 20, 2013.

II. Positions of the Parties

A. GLS

[8] GLS argues that the handling of bulk cargo does not require checking and contends that ILA 1879 has never enforced the application of its certification with respect to the handling of bulk cargo. It alleges that other longshore employers in the Port of Hamilton that handle bulk cargoes, including FMT, James Richardson International, Parrish and Heimbecker Limited and Agrico Canada Limited, have never hired ILA 1879 members in connection with their bulk operations and that, since its certification in 1991, ILA 1879 has never filed a grievance with respect to that practice at any of these companies. It suggests that this is evidence that ILA 1879 understands that its bargaining rights do not extend to bulk cargo.

[9] GLS requests that the Board confirm that the scope of the geographic certification granted to ILA 1879 in 1991 excludes the checking of bulk cargo.

[10] GLS asserts that, while section 34(5) of the *Code* deems the MEA to be an employer and provides the MEA with the power to discharge the duties and responsibilities of an employer,

such powers are limited. It contends that the MEA's statutory authority for collective bargaining and administration of the collective agreement does not preclude an individual employer from seeking a ruling from the Board on the scope of the certification order. GLS submits that an employer that is subject to a geographic certification order, although represented by an employer association, must have standing when determining its own status with respect to that order. It argues that it is therefore legitimate and legal for GLS to place the question of the scope of ILA 1879's certification order before the Board.

[11] GLS reminds the Board that it has the exclusive jurisdiction to deal with questions related to the scope of the certification orders it has issued, and suggests that the issue will not be resolved by the ongoing arbitration proceedings.

B. ILA 1879

[12] ILA 1879 asserts that GLS does not have standing to bring this application, as it is the MEA and not GLS that is the employer for the purposes of the *Code*. It argues that an individual employer cannot bring an application to amend the port-wide geographic certification that binds all of the longshore employers in the Port of Hamilton and thereby seek to unilaterally alter the bargaining relationship that applies to the union and the MEA.

[13] ILA 1879 also asserts that there are no grounds for reviewing the 1991 certification order, as its collective agreement has applied to bulk cargo for almost fifty years. It contends that it has always asserted its bargaining rights with respect to bulk cargo, both prior to and since certification. ILA 1879 points out that there was significant bulk cargo activity in the Port of Hamilton during the 1980s and checkers were employed regularly to oversee the loading and unloading of bulk cargo. However, bulk cargo work declined in the late 1980s and, until relatively recently, there was no bulk cargo work in the Port of Hamilton over which ILA 1879 could claim jurisdiction. ILA 1879 claims that the bulk cargo work carried out by GLS in 2010 was the first work of this nature of which it was aware. It filed the grievance with respect to that event in order to enforce its rights to this work under the collective agreement with the MEA.

[14] ILA 1879 denies that checking is not part of bulk cargo handling. It states that checkers were always employed to oversee the loading and unloading of both break bulk and bulk cargo.

Terminal foremen, who were also checkers, would oversee the operation of all checkers in the loading of trucks, giving directions to terminal crews and ensuring a complete and smooth operation. ILA 1879 argues that, as bulk cargo is not expressly excluded from the terms of its certification order (as is the case in ILA 1654's certification order with respect to FMT's bulk cargo that is handled by longshoremen represented by the Teamsters Union Local 879), ILA 1879's certification order must be interpreted as including jurisdiction over bulk cargo.

[15] ILA 1879 alleges that GLS is attempting to obtain, through this application, that which the MEA could not obtain through collective bargaining, namely the removal of the provisions in the collective agreement related to bulk cargo. The MEA had made such a demand in the round of collective bargaining that resulted in the November 2011 renewal of the parties' collective agreement, but abandoned that demand when it was rejected by the union.

[16] ILA 1879 also points out that an arbitrator is currently seized with the issue of the use of its members as checkers for the loading of a bulk cargo, salt, onto trucks, and alleges that GLS has filed this application in an effort to circumvent the arbitration process. It reminds the Board that in *Maritime Employers Association*, 2012 CIRB 666 (*MEA 666*), the Board dismissed an application by the MEA that, among other things, sought to suspend those arbitration proceedings in late 2012.

C. MEA

[17] The MEA, as the designated employer representative in the Port of Hamilton, also asserts that GLS does not have standing to bring this application. It argues that, pursuant to section 34(5) of the *Code*, the MEA has the exclusive right and obligation to discharge all of the duties and obligations of the employers subject to ILA 1879's certification, including GLS.

[18] The MEA points out that it agrees with GLS that neither ILA 1879's geographic certification nor the collective agreement between the MEA and ILA 1879 contemplates checking activities in respect of bulk cargoes, and that it is advancing this position in the ongoing arbitration proceeding. It reminds the Board that it requested the Board to issue a declaratory opinion to this effect in October 2012, but that the Board declined to do so (*MEA 666*, *supra*).

[19] Nevertheless, the MEA submits that GLS does not have standing to bring the instant application. It argues that the *Code* provides a unique legislative paradigm to govern labour relations in the longshoring industry, the purpose of which is to minimize labour relations disruptions in Canadian ports by eliminating multiple bargaining structures. It suggests that, generally speaking, an application under section 18 to amend or vary a geographic certification order affects all of the employers subject to that order. Accordingly, any decision relating to whether such an amendment is advisable must be made by the MEA on behalf of all of those employers. The MEA contends that permitting an individual employer, such as GLS, to unilaterally seek changes to a geographic certification order would defeat the legislative system designed to ensure labour relations stability in ports that are subject to geographic certification. The MEA asserts that the erosion of its statutory authority as exclusive bargaining representative for all employers in the port could lead to considerable labour relations instability, to the detriment of all parties. Accordingly, the MEA must be permitted to retain control over decisions that fundamentally affect the conduct of labour relations in the Port of Hamilton, in order to ensure that all employers' interests are fairly considered when decisions are made.

[20] The MEA advises the Board that the arbitrator seized with ILA 1879's grievance, Mr. Christopher Albertyn, has denied GLS standing in his proceedings, recognizing that to permit such an intervention would necessarily undermine the notion of exclusive bargaining representation that is fundamental to our system of labour relations. It submits that Arbitrator Albertyn's reasoning is equally applicable to the question of GLS' standing to file the instant application with the Board.

[21] The MEA also takes the position that, even if the Board finds that GLS has standing to make this application, it would be inappropriate for the Board to engage in parallel proceedings to those of the arbitrator. It submits that the issue of whether or not the collective agreement contemplates bulk checking activity is squarely before Arbitrator Albertyn and it would not serve any labour relations purpose for the Board to consider GLS's application prior to the completion of the arbitration proceeding.

[22] The MEA also suggests that, once the arbitration award is issued, the MEA can decide whether it is necessary or advisable for it, as the exclusive employer representative, to apply to the Board for an amendment to ILA 1879's certification order pursuant to section 18 of the *Code*.

III. Analysis and Decision

[23] The history of the contentious labour relations in the St. Lawrence ports that led Parliament to add the geographic certification provision (section 34) to the *Code* in 1973 have been well documented (see, for example, Alexander C. Pathy, *Waterfront Blues: Labour Strife at the Port of Montreal, 1960-1978*, (University of Toronto Press Incorporated, 2004); *Maritime Employers' Association and Terminaux Portuaires du Québec* (1987), 72 di 26; and 88 CLLC 16,007 (CLRB no. 658); and *Quebec Ports Terminals Inc. et al.* (1992), 89 di 153; and 93 CLLC 16,035 (CLRB no. 967) and need not be repeated here.

[24] In *Maritime Employers' Association et al.* (1991), 84 di 161 (CLRB no. 857), the CLRB dealt specifically with the application of section 34 of the *Code* in the Port of Hamilton, Ontario. It found that a geographic certification was warranted to address the confused and unstable collective bargaining situation that existed in the port. At the time, the CLRB explained that the purpose of the mandatory employer representation system that the Board has discretion to impose pursuant to section 34 is to minimize the number of friction points and general potential for instability in labour relations.

[25] A review of the Board's jurisprudence with respect to section 34 indicates that the Board has always treated the appointment of an employer representative as similar to the certification of a union. For example, any collective agreement concluded by the employer representative binds all employers, whether or not they consent to be bound, just as a collective agreement concluded by a certified bargaining agent binds all employees in the bargaining unit, whether or not they voted to ratify that agreement. Just like trade unions, employer representatives are entitled to act without the unanimous consent of those they represent *(Maritime Employers' Association* (1993), 92 di 135; and 94 CLLC 16,027 (CLRB no. 1027), affirmed by the Federal Court of Appeal (*Quebec Ports Terminals Inc.* v. *Canada (Labour Relations Board)*, (1995) 1 F.C. 459; [1994] 175 N.R. 372; (1994) 29 Admin. L.R. (2d) 189; and (1994) 95 CLLC 210-010)).

[26] However, despite the considerable jurisprudence that exists with respect to the geographic certification provision, it does not appear that the Board, or the predecessor CLRB, has dealt with the question of whether a longshore employer that is subject to a geographic certification, and consequently representation by a mandatory employer representative, has standing to bring an application or complaint to the Board in its own right.

[27] GLS argues that an employer that is subject to a geographic certification order must have standing with respect to questions of its own status in respect of that order. Given the nature of the regime established by the admittedly unique geographic certification provision, the Board is not persuaded by this argument. In the Board's opinion, it would be antithetical to the concept of exclusive bargaining authority if individual members were to be permitted to advance a position before the Board that is contrary to the interests of the majority and to thereby subvert the authority of their statutorily mandated representative.

[28] In the Board's view, the purpose of section 34 of the *Code* and the rationale for its existence would be completely undermined if individual employers could bring applications, such as this one, which challenge the certification order that forms the foundation of the labour-management relationship. For the Board to grant standing to an individual employer in these circumstances would risk a return to the confused and unstable collective bargaining environment that previously existed in the Port of Hamilton and therefore run contrary to Parliament's intent in enacting the geographic certification provision.

[29] Accordingly, the Board finds that GLS does not have standing to bring this application under the *Code*.

[30] However, if the Board is wrong, and GLS does have standing to bring this application, the Board would have dismissed the application on its merits.

[31] The Board has consistently held that, when it creates an "all employee" bargaining unit, there is a presumption that all of the employees are included in the unit (see, for example, *Laurentian Bank of Canada*, 2004 CIRB 295 at paragraph 22). A party seeking exclusions from an "all employee" unit bears the burden of justifying such an exclusion (*Algoma Central Marine, a Division of Algoma Central Corporation*, 2010 CIRB 531). This approach to the determination

of bargaining units is demonstrated by ILA 1654's certification order, which expressly excludes longshoremen working for FMT who are represented by a different bargaining agent for the purposes of bulk cargo. The fact that a similar exclusion for bulk cargo of any kind does not appear in ILA 1879's certification order speaks for itself. GLS has not demonstrated that the CLRB intended to exclude bulk cargo from the scope of ILA 1879's certification order at the time it issued that certification order, nor has it justified that such an exclusion is warranted at this time.

[32] The application is therefore dismissed.

[33] Given the Board's decision with respect to the applicant's standing, it is not necessary for the Board to deal with the intervenor applications filed by ILA 1654 and Waterford Crushing and Screening.

[34] This is a unanimous decision of the Board.

Elizabeth MacPherson
Chairperson

John Bowman
Member

André Lecavalier
Member